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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/086,532	02/28/2002	Michael Kauschke	34303/48	3809
7590	03/01/2004		EXAMINER	
Neal L. Rosenberg, Esq. AMSTER, ROTHSTEIN & EBENSTEIN 90 Park Avenue New York, NY 10016			WATKINS III, WILLIAM P	
			ART UNIT	PAPER NUMBER
			1772	
DATE MAILED: 03/01/2004				

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)
	10/086,532	KAUSCHKE ET AL.
	Examiner	Art Unit
	William P. Watkins III	1772

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) Responsive to communication(s) filed on 03 December 2003.
 2a) This action is **FINAL**. 2b) This action is non-final.
 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) Claim(s) 1-73, 75-95 and 101-108 is/are pending in the application.
 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
 5) Claim(s) _____ is/are allowed.
 6) Claim(s) 1-73, 75-95 and 101-108 is/are rejected.
 7) Claim(s) _____ is/are objected to.
 8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) The specification is objected to by the Examiner.
 10) The drawing(s) filed on _____ is/are: a) accepted or b) objected to by the Examiner.
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
 a) All b) Some * c) None of:
 1. Certified copies of the priority documents have been received.
 2. Certified copies of the priority documents have been received in Application No. _____.
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____ | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

1. The rejections over Gegelys are withdrawn in view of applicant's arguments in the paper filed 03 December 2003. The examiner agrees that Gegelys teaches a size of apertures that allows initial penetration of water through the barrier layer, which teaches away from "essentially instantaneously" blocking of the pores upon liquid contact.
2. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

4. Claims 1-73, 75-95, 101-108 are rejected under 35 U.S.C. 102(e) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Ciamaichella et al. (U.S. 6,436,508 B1).

See the abstract, which teaches a breathable barrier layer with an attached expandable second material layer. The breathable layer is considered as apertured, but the term apertured sheet is defined broadly in the specification as including fibrous wovens and nonwovens as well as microporous film (col. 7, lines 45-55), with microscopic apertures (col. 7, line 60 through col. 8, lines 15). Pores are generally defined as microscopic openings. See the coated layers in Example 1, which recites nonwovens with no specific recited apertures. The examiner takes the openings between the fibers as being the apertures or pores of the nonwoven fabric. Coating within the apertures within the breathable sheet is taught as an option (col. 4, lines 1-15, which defines the inner surface as the

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aperture defined between the garment facing and wearer facing surfaces). This meets the instant language of instant claim 67, which requires the second expandable material being within the first material. The expandable material may also be between two layers as in Example 1, which meets the language of instant claim 1. The instant claims call for specific MVTR and air permeability rates. As the reference teaches the same properties of permeability and structure it is presumed that the numerical rates of the claims are met as the PTO does not have the ability to run comparative tests. See MPEP 2112.

5. Applicant's arguments filed 03 December 2003 have been fully considered but they are not persuasive.

Applicant argues regarding Ciampaichella et al. that the reference does not teach the expandable material "essentially instantaneously" blocking the pores because the test given at column 11, lines 1-10 to test air permeability requires that the liquid be applied for a number of seconds. The position of the examiner is that the test recites a number of seconds merely to insure a consistent result regarding air permeability and does not imply that the liquid permeability is limited only after 60 seconds. Applicant's specification describes "essentially

instantaneously expandable" at page 9, lines 15-20 as being for "all practical purposes". The examiner constructs this as meaning that the material must expand fast enough to prevent liquid penetration in the practical applications where the barrier is used. Applicant further argues that Ciampaichella et al. teaches a barrier layer only next to an absorbent layer and that this is different than applicant's disclosed surgical gown application. The examiner disagrees. While Ciampaichella et al. is drawn to absorbent articles the reference clearly teaches at col. 4, lines 50-60 that the absorbent material is applied to the barrier layer at the point of maximum liquid discharge in a way that closes the apertures or pores on contact and prevents liquid penetration throughout the layer. This is the "essentially instantaneously" performance of applicant's claimed barrier layer as constructed above in both absorbent and gown applications. Ciampaichella et al. is thus taken as meeting applicant's claim language.

6. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is

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reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

7. Any inquiry concerning this communication or earlier communications from the examiner should be directed to William P. Watkins III whose telephone number is 703-308-2420. The examiner works an increased flex time schedule, but can normally be reached Monday through Friday, 11:30 A.M. through 8:00 P.M. Eastern Time. The examiner returns all calls within one business day unless an extended absence is noted on his voice mail greeting.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Harold Pyon can be reached on 703-308-4251. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9306 for regular communications and (703) 872-9306 for After Final communications.

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Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0651.



WW/ww
February 21, 2004

WILLIAM P. WATKINS III
PRIMARY EXAMINER